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No. 93-1736

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WILLIE C. PUGH, JR.,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

When a defendant alleges ineffective assistance of counsel before a guilty plea, and specifically claims that counsel provided erroneous advice about potential affirmative defenses, can a reviewing court consider the likelihood of an acquittal when assessing resulting prejudice for *Hill v. Lockhart*?

II.

As long as there is a factual basis from which defendant's guilt can be inferred, must a trial judge obtain defendant's unqualified admission of guilt before accepting his guilty plea?

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PRAYER

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent respectfully urges this Honorable Court to deny the petition for writ of certiorari to the Illinois Supreme Court.

OPINION BELOW

The Illinois Supreme Court affirmed Petitioner's convictions and death sentence on direct appeal in *People v. Pugh*, 623 N.E.2d 255 (Ill. Sup. Ct. 1993). A copy of that opinion is appended to the certiorari petition.

JURISDICTION

Petitioner seeks discretionary review by means of certiorari under 28 U.S.C. sec. 1254(1) (1994).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. V

[N]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. XIV

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Willie C. Pugh Jr. ["Petitioner"] seeks certiorari review of his conviction for murder for the December 16, 1986 shooting death of a nineteen year old gas station attendant named Brian Douglas in South Chicago Heights, Illinois. Police officers dispatched to a Clark gas station found an armed robbery in progress. The officers saw Petitioner standing behind a counter pointing a sawed-off shot gun at Douglas; Petitioner announced "Don't push me, I want out". While holding Douglas at gunpoint, Petitioner managed to walk out the door and around the corner of the

station. One of the officers pursued him. While the officer stood about 100 feet away, Petitioner took 1½ steps back, lowered the shotgun, and fired into Douglas' chest. Douglas died a short time later as a result of that gunshot wound. That police officer was unable to apprehend Petitioner, but another officer arrested him less than a block away from the station.

In a custodial statement given to a police detective and an assistant state's attorney the next day, Petitioner admitted both the armed robbery and the shooting. Petitioner claimed accident, however; "The gun went off while it was in my hand", he asserted. Petitioner helped police officers recover the murder weapon after he finished giving his statement.

Represented by counsel, Petitioner pleaded guilty to an eleven count indictment that included charges of murder, armed robbery, forcible detention and unlawful use of a weapon. The murder counts charged Pugh with violations of all three murder theories under Illinois law.[1] The trial judge accepted Pugh's guilty pleas to all counts, entered judgment on the felony murder count, dismissed the in-

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[1] When Petitioner entered his guilty pleas, *Ill. Rev. Stat.* ch. 38, para. 9-1(a)(1) (1985) defined intentional murder in the following manner: "A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death, he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another". A person committed section 9-1(a)(3) felony murder if he committed the acts while "attempting or committing a forcible felony other than voluntary manslaughter". Accident is not a defense to felony murder under Illinois law. *See, e.g., People v. Allen*, 309 N.E.2d 544 (Ill. 1974). Although the legislature amended the statute in 1992, felony murder is still defined as a non-intentional act.

tentional murder charge, and entered judgment on the remaining felony convictions. (Pet. App. A-2 to A-4).

At the bench sentencing hearing, the parties stipulated Petitioner's eligibility for the death penalty because he had committed a murder in the course of a felony.[2] The parties then presented evidence in aggravation and mitigation. Testifying for the State, one of the officers present at the scene gave a more detailed account of the shooting. He described how defendant "released Douglas, took about two steps to the side, lowered the shotgun, put his other hand under the stock and, about four seconds later, shot Douglas". (Pet. App. A-6). Petitioner presented evidence in mitigation from a high school counsellor, a family friend, his parents, and the probation officer who had prepared a pre-sentence investigation report. Petitioner also testified on his own behalf at sentencing. Petitioner claimed he had been drinking and smoking marijuana laced with PCP on the day of the crimes. He also denied any intent to kill and reiterated the shotgun accidentally discharged when he turned to run. The trial judge sentenced Petitioner to death for the murder of Brian Douglas and imposed penitentiary terms for the remaining felonies. (*Id.* at A-6 to A-7).

Represented by new counsel, Petitioner filed a battery of post-trial motions in which he sought to withdraw his pleas and vacate his death sentence. Petitioner claimed

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[2] Under *Ill. Rev. Stat.* ch. 38, para. 9-1(b)(6) (1985), a defendant was eligible for the death penalty if the victim was killed "in the course of another felony". Although the State was not required to prove defendant's intent to kill to obtain a murder conviction, intent had to be proven beyond reasonable doubt to obtain death eligibility. *See id.* at sec. 9-1(b)(6)(b) and *People v. Ramey*, 603 N.E.2d 519 (Ill. 1992), *cert. denied*, 113 S. Ct. 2419 (1993).

ineffective assistance of counsel and alleged his attorney did not know the State was required to prove an intent to kill in order to obtain the death penalty. Petitioner submitted an affidavit from trial counsel in which counsel stated he was laboring under the mistaken belief that murder in the course of a felony was sufficient for death penalty eligibility. Counsel further averred he would not have advised his client to plead guilty if he had been aware of the intent requirement of proof. Petitioner submitted an affidavit which generally corroborated those allegations. The trial judge denied the motions. (*Id.* at A-7 to A-9).

On direct appeal, the Illinois Supreme Court decided Petitioner had not demonstrated ineffective assistance of counsel at the trial phase of these proceedings. The court specifically held that Petitioner had not demonstrated resulting prejudice as required by *Strickland v. Washington*, 466 U.S. 668 (1984 and *Hill v. Lockhart*, 474 U.S. 52 (1985) because state law did not recognize accident as a defense to felony murder. The court did decide, however, that counsel's advice did not fall within the range of competence demanded of attorneys in criminal cases. The court further concluded that, but for counsel's error, Petitioner would not have allowed the parties to stipulate his eligibility for the death penalty. (Pet. App. A-17). Because he did not understand the law, counsel did not present evidence of an accidental shooting which might have prevented the State from proving the intent necessary for eligibility. The court accordingly vacated the death penalty and remanded the case for a new sentencing hearing. Petitioner now seeks certiorari review of his murder conviction.

REASONS FOR DENYING THE WRIT

I.

IN *HILL v. LOCKHART*, THIS COURT FORMULATED A STANDARD OF REVIEW FOR CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL BEFORE A GUILTY PLEA. IF THE DEFENDANT ALLEGES THAT COUNSEL PROVIDED ERRONEOUS ADVICE ABOUT POTENTIAL AFFIRMATIVE DEFENSES, THE APPELLATE COURT MAY CONSIDER THE LIKELIHOOD OF AN ACQUITTAL WHEN ASSESSING RESULTING PREJUDICE.

In *Hill v. Lockhart*, 474 U.S. 52 (1985), this Court extended the two-part *Strickland v. Washington*, 466 U.S. 668 (1984) test for assessing counsel's performance at the time a guilty plea is entered. Without dispute, the Illinois courts have adopted the *Hill* standard. The Illinois Supreme Court applied that standard in this very case. (Pet. App. A-11). Petitioner claims the lower court misunderstood the *Hill* prejudice test, however. According to him, the Illinois Supreme Court improperly used a "prejudice or harmless error approach". (Pet. 7). Reviewing courts should never assess the strength of the State's evidence or determine the likelihood of an acquittal at trial, he reasons. In contrast to the "trial outcome" or "acquittal standard" used below, the courts should focus solely on the "plea outcome" and decide whether, but for counsel's error, the accused would have entered a not guilty plea. (*Id.* at 12).[3] In this connection, Petitioner

[3] Petitioner apparently believes the reviewing court should *never* look beyond the plea proceedings to determine the effect of attorney error on a guilty plea. Respondent submits the likelihood of an acquittal is relevant when, as here, a defendant alleges he forfeited an affirmative defense. Respondent does not suggest any particular type of prejudice test for any other type of ineffective assistance claim, however.

perceives a conflict among the lower state and federal courts which he feels should be addressed. (*Id.* at 9-14).

Certiorari review should be denied because counsel has misread the decisions he has cited. The Illinois court's decision was not an aberration, much less any indication of confusion in the law. The lower courts are applying *Hill* correctly, and there is no need for this Court's authoritative guidance at this time.

Respondent initially notes the Illinois Supreme Court did not refuse to find resulting prejudice because the evidence of Petitioner's guilt was overwhelming. Counsel complains "the court below treated Petitioner's case as if the issue were the sufficiency of the evidence" (Pet. 12), but in fact the court firmly refused to assess the strength of the State's case at the trial phase of these proceedings. (Pet. A-12 to A-13). The lower court rejected Petitioner's ineffective assistance claim, and ruled he could not demonstrate resulting prejudice, for the very different reason that Petitioner had no affirmative defense to use at trial. Petitioner was convicted of felony murder, and accident is not a defense to felony murder under Illinois law. *See, e.g., People v. Allen*, 309 N.E.2d 544 (Ill. 1974). The lower court did not conduct a harmless error analysis.[4]

Equally important, Petitioner has nearly ignored a crucial passage in the *Hill* opinion. To satisfy the "prejudice" component of *Hill*, a defendant must show "a reasonable

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[4] Petitioner is correct in one respect: courts should not engage in harmless error analyses when entertaining claims of ineffective assistance of counsel. When, as here, the defendant cannot demonstrate resulting prejudice, there is no error (prejudicial or harmless) and no Sixth Amendment violation as a result. For *Strickland*-based tests, the burden of proving harmlessness never shifts to the State.

probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial". 474 U.S. at 59. Of course it is always difficult to determine a defendant's state of mind or ascertain what a defendant might otherwise have done if he had received different advice from his attorney. There are some obvious evidentiary problems as well. Unless a defendant's affidavit is to be accepted as conclusive evidence, some sort of objective test is needed to determine whether, but for counsel's error, a defendant would have pleaded not guilty. The *Hill* Court addressed those very problems, however, when it provided examples to assist the lower appellate courts:

> [W]here the alleged error of counsel is a failure investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. *This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.*

The Court then addressed the precise issue at bar concerning erroneous advice about available defenses:

> Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, *the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.*

Id. at 59 (emphasis added), citing *Evans v. Meyer*, 742 F.2d 371, 375 (7th Cir. 1974) (where the court found it "inconceivable" that defendant would have been acquitted if he had proceeded to trial with an intoxication defense).

The Illinois Supreme Court was asked to determine whether Petitioner was prejudiced by legal advice that caused him to forfeit the affirmative defense of accident. That court should not be faulted for calculating the likelihood of an acquittal at trial. When the Illinois Supreme Court quoted and applied this passage from the *Hill* opinion to dismiss defendant's argument, it merely did what it was told. (Pet. A-12).

Petitioner is equally unpersuasive when he claims the lower court's decision conflicts with cases from other state and federal courts. By means of a long string citation, Petitioner claims most courts consider the plea outcome rather than the trial outcome. (Pet. 9-10). Not one of those courts actually criticized the trial outcome standard, however. Most of those cases do not even mention it because the defendants therein did not lose affirmative defenses as a result of counsel incompetence. In *Yordan v. Dugger*, 909 F.2d 474, 478 (11th Cir. 1990), for example, the court remanded for an evidentiary hearing because counsel had given Yordan bad advice about his parole eligibility. The court had no reason to consider the possibility of an acquittal because the error could not have affected defendant's trial.

One of Petitioner's cited cases actually supports the approach taken by the Illinois Supreme Court. In *Hooper v. Garraghty*, 845 F.2d 471 (4th Cir. 1988), defendant challenged the competence of an attorney who failed to investigate the possibility of an insanity defense. The court agreed it should determine whether, but for counsel's failure, defendant would have declined the plea bargain and gone to trial. But then the court considered the overwhelming evidence of Hooper's guilt, as well as the weak probative value of his expert testimony, before concluding defendant was not prejudiced. The court decided there

was no reasonable probability that the jury would have found he was insane. *Id.* at 475. *See also Leatherwood v. Mississippi*, 539 So. 2d 1378, 1386 (Miss. 1989) (en banc) (where defendant received erroneous advice about his sentencing hearing, and the court held the prejudice inquiry should not look beyond the plea process; "we are not confronted with . . . a failure to advise the defendant of a potential affirmative defense").

All of Petitioner's remaining cases are irrelevant. For example, Petitioner cites six decisions including *United States v. Chronic*, (sic) 466 U.S. 648 (1984) for the proposition that prejudice should be presumed whenever counsel was incompetent during a critical stage of a proceeding. (Pet. 8-9). Because Petitioner did not suffer a conflict of interest or other constructive denial of counsel, those citations should be ignored. The *Hill* decision is the rule of law for claims of ineffective assistance of counsel before a guilty plea, and the Illinois Supreme Court correctly applied the *Hill* prejudice test to the case at bar.

II.

NORTH CAROLINA v. ALFORD RESOLVED ANY CONFUSION IN THE LAW. AS LONG AS THERE IS A FACTUAL BASIS FROM WHICH DEFENDANT'S GUILT CAN BE INFERRED, A GUILTY PLEA NEED NOT MANIFEST AN UNQUALIFIED ADMISSION OF GUILT.

In his second argument for certiorari review, Petitioner maintains his claim of accident vitiated the voluntary and intelligent character of his plea. Petitioner claims he could not enter a valid guilty plea to a felony murder charge as long as he denied his intent to kill.

In *North Carolina v. Alford*, 400 U.S. 25 (1970), however, this Court decided an express admission of guilt is not a constitutional prerequisite to a guilty plea. As long

as there is an adequate factual basis from which guilt can be inferred, a defendant can voluntarily and knowingly plead guilty even though he maintains his innocence. *Id.* at 37. The lower court applied this standard and decided that Petitioner did not need to admit an intent to kill to be found guilty of murder because accident is not a defense to felony murder in Illinois. (Pet. App. A-21 to A-22). Petitioner admitted robbing a gas station attendant and he further admitted inflicting the gunshot wound that killed the victim. Regardless of his understanding of the felony murder doctrine, the factual basis in Petitioner's case was sufficient to support his murder conviction and his plea was properly accepted.

In the course of the *Alford* opinion, this Court noted the earlier confusion that had existed in the lower state and federal courts on this issue. 400 U.S. at 33-35. Petitioner cites a number of pre-1970 decisions and attempts to resurrect that conflict. (Pet. 15). Any uncertainty in the law ended 24 years ago when the *Alford* case was decided, however. The law is clear, and the correct law was applied in this case to reject Petitioner's claim.

Petitioner also seeks to distinguish *Alford* for the reasons that he received incorrect advice from his attorney and did not obtain any benefit by pleading to a lesser charge. Both of those distinctions are irrelevant and were not mentioned in the *Alford* court's holding. A defendant's motivation for claiming innocence and his subjective evaluation of the case is simply immaterial. Some defendants say they are innocent because they are stubborn men who refuse to accept the inevitability of conviction in the face of abundant evidence of their guilt. Other defendants may be misled and do not realize the legal significance of their admitted conduct. *Alford* applies in both situations, however. *Alford* reflects the basic reality that a defendant

is not denied due process of law when a court accepts a guilty plea supported by sufficient evidence of guilt. "There is room for the conclusion that judgment on a plea of guilty is not contrary to justice if based on a high probability of the outcome of trial, even though neither a plea nor a verdict of guilty would conform to the defendant's subjective evaluation." *Bruce v. United States*, 379 F.2d 113, 120 (D.C. Cir. 1967).

The other cases cited by Petitioner should be disregarded. *Norwood v. State*, 728 S.W.2d 59 (Tex. Ct. App. 1987) does not address the present issue at all. Defendant Norwood denied both the acts constituting the crime and the involvement necessary to support an accountability conviction. In marked contrast to the instant case, there was no factual basis to support Norwood's plea and the plea was invalid for that reason. *Patton v. State*, 517 N.E.2d 374 (Ind. 1987) merely stands for the proposition that the state courts can extend greater protections as a matter of state law, a point noted by the *Alford* court itself. 400 U.S. at 38, n.11. In *Ross v. State*, 456 N.E.2d 420 (1983), cited in *Patton*, 517 N.E.2d at 376, the Indiana Supreme Court considered and rejected *Alford*, and ruled a judge cannot accept a guilty plea that is accompanied by a protestation of innocence. The Indiana practice is irrelevant to pleas entered in Illinois courts, however, and Indiana practice cannot modify *Alford* or federal constitutional law in any way. Petitioner has not identified any substantial federal question for this Court's discretionary review.

CONCLUSION

Respondent respectfully urges this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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